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In the Supreme Court of the United States

No. 70-5045

DONALD and EDNA LINDSEY et al,

Appellants,

v.

DOROTHEA M. NORMET, THE HONORABLE WILLIAM C. BEERS, in his capacity as Judge of the District Court of the State of Oregon for the County of Multnomah, and all persons similarly situated holding office as Judges of the District Court of the State of Oregon for the County of Multnomah,

Appellees.

On Appeal from the United States District Court for the District of Oregon

BRIEF OF APPELLEE NORMET

THEODORE B. JENSEN
DONALD J. DeFRANCQ
623 S. W. Oak Street
Portland, Oregon 97205
Counsel for Appellee Dorothea M. Normet

THOMAS J. LEKAS
812 S. W. Washington
Portland, Oregon 97205
WILLIAM A. MARTIN
Commonwealth Bldg.
Portland, Oregon 97204
Of Counsel

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 9-71

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On Appeal from the United States District Court for the District of Oregon

BRIEF OF APPELLEE NORMET

STATEMENT OF THE CASE

Substantially all of the facts of the case are agreed and are set forth in the Pretrial Order (A. 42-50). Appellee deems it necessary to supplement appellants' statement of the case and clarify certain of the statements of fact made by the appellants.

At the time this case arose appellee was the owner of the seller's interest in a single family residence under a contract of sale thereof, and held the legal title only to secure the purchaser's performance of

the contract. An assignee of the purchaser's interest in the contract had rented the residence to appellants. Appellants are month to month tenants and their tenancy can be terminated by either party by 30 days' prior written notice ot the other party (A. 42-44); see Or. Rev. Stat. § 91.070. Appellants paid in advance $100 per month as rent for the residence (A. 42).

When appellee did not receive a number of the payments due under the contract of sale, appellee began collecting the rent from appellants and crediting the amounts received on the unpaid balance under the contract of sale. Even after crediting such amounts, the assignee of the purchaser was in default under the contract, and appellee filed a suit to foreclose all rights in the residence arising under the contract of sale. Appellants were named as defendants because they were in possession of the residence (A. 44).

Prior thereto a complaint was made to the Bureau of Buildings of the City of Portland, Oregon, in behalf of the appellants concerning the condition of the residence. The Bureau inspected the residence and found certain conditions that violated the Portland Housing Code. The Bureau ordered the appellants and appellee to vacate the residence within 30 days or show cause why the residence should not be vacated. Appellants requested appellee to make the required repairs, and appellee made certain repairs. However, appellee did not make any repairs requiring substantial expenditures due to the condition of the title to the residence. Appellants did not vacate the residence

as directed by the Bureau, and thereafter refused to pay the rent as it became due (A. 42-44). Appellants contended that they were threatened with eviction, and filed this case in the U. S. District Court for the District of Oregon seeking a declaration that Or. Rev. Stat. §§ 105.105-.160 are unconstitutional and an order enjoining appellee, the judges of the District Court of the State of Oregon for the County of Multnomah, the Director of the Bureau of Buildings, and others from evicting appellants from the residence.

Appellants' statement that appellee threatened to evict appellants in retaliation for reporting violations of the Housing Code of the City of Portland, Oregon, is mere speculation and is not supported by the agreed facts or any other evidence in the case. Appellee merely advised the appellants that they must vacate the residence in compliance with the order of the Bureau of Buildings of the City of Portland (Pl. Ex. 14; transcript of proceedings June 18, 1970, at p. 50). Appellee has not filed against appellants any eviction action under Or. Rev. Stat. §§ 105.105-.160.

One of the other initial plaintiffs, Evaret Snyder, did not report any housing code violations to the City of Portland, and none were found to exist. Snyder merely refused to pay rent unless his landlord made certain requested repairs. The Oregon Legislature has not enacted a statute granting a tenant the right to withhold payment of rent to compel a landlord to repair rented property. Snyder was threatened with eviction solely for not paying rent when it became

due and not in retaliation for his exercise of any legal right (A. 45).

Eviction actions were filed against three of the other plaintiffs, Bonnie L. Colton, Keith L. Oetting and Randall Lowe (Pl. Exs. 1, 2, 47; transcript of proceedings June 18, 1970, at page 50; A. 46-49). The tenants raised certain of the defenses discussed by appellants, but in none of the eviction actions did the tenants raise the defense that they were being evicted in retaliation for reporting housing code violations or exercising any other legal rights (Pl. Exs. 1, 2, 47). Bonnie L. Colton was permitted to raise all of the affirmative defenses which she desired to raise in the eviction action brought against her. The landlord did not object (A. 46). In the Oetting and Lowe eviction actions the defenses were stricken on the grounds that the defenses were not relevant to the question of who had the right to possession of the property (A. 47-49). None of the cases were appealed to the Oregon Supreme Court.

Prior to the entry of the judgment of the U. S. District Court in this case, the case was dismissed and rendered moot as to the issues between all of the plaintiffs and their respective defendants except the issues between Donald Lindsay and Edna Lindsay and Dorothea M. Normet and the judges of the District Court of the State of Oregon for the County of Multnomah (A. 4, 7, 9, 48).

The U. S. District Court issued its opinion and judgment declaring that Oregon's eviction statutes,

Or. Rev. Stat. §§ 105.105-.160 are constitutional, vacating the temporary restraining order issued during the pendency of the case, and dismissing the action (A. 72-79). The only plaintiffs appealing the judgment of the U. S. District Court are the Lindsays, the issues between all of the other parties having been dismissed and rendered moot.

The appellants contend here for the first time that the Oregon courts will not allow the defense of retaliatory eviction in an eviction action. There is no evidence in this case that the defense of retaliatory eviction has been presented to an Oregon trial or appellate court in an eviction action, nor was the contention that retaliatory eviction was not an available defense raised or argued to the U. S. District Court in the proceedings below either in written briefs or oral argument (R. 55-122, 148A-149; transcript of proceedings June 18, 1970).

ARGUMENT

1. Oregon's eviction law does not deny tenants the Equal Protection of the law guaranteed by the Fourteenth Amendment to the U. S. Constitution.

Oregon's eviction law protects one in possession of real property, such as a tenant, from forcible eviction by anyone claiming the right to possession of the property.[1] A person claiming the right to possession of real property in the possession of another is prohibited from taking possession of the property without first obtaining a court determination that he has the legal right to possession.[2] Also, he must allow the county sheriff to repossess the property for him.[3]

Oregon's eviction law does not establish a "suspect classification" as appellants contend. There are obvious factual and legal characteristics which are unique to the landlord-tenant relationship. The landlord owns the real property and is entitled to certain rights which are derived from such ownership. The tenant has possession of the landlord's property, and is in a position to deny the landlord these rights unless the landlord is entitled to remove the tenant from the property when his rights are denied. The state compels a landlord to obtain a court determination that he is legally entitled to possession of his property before he can remove the tenant from it. These unique characteristics are sufficient justification for the

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[1] Or. Rev. Stat. § 105.105.
[2] Or. Rev. Stat. § 105.110.
[3] Or. Rev. Stat. § 105.155.

state to provide a special procedure for determining the right to possession of real property in the possession of a tenant. The consideration of only the right to possession and relevant defenses, and the elimination of the extensive delays of the ordinary litigation process unless the landlord is provided adequate security are clearly relevant to the objective of the eviction law.

Since there is sufficient justification for providing a special procedure for determining the legal right to possession of real property between a tenant and a landlord claiming the legal right to possession, and the procedure established accomplishes the objective of the law in a reasonable manner, Oregon's eviction law does not violate the Equal Protection clause of the Fourteenth Amendment to the U. S. Constitution.[4] The mere fact that a more desirable procedure could have been established by the Oregon Legislature does not render the actual procedure established unconstitutional.[5]

Oregon's eviction law makes available to landlords and tenants an added procedure for obtaining a court determination of the right to possession of the rented property and relevant defenses. The procedure is an addition to the general court procedure. The eviction procedure does not deprive a tenant of the right to assert other claims he may have against his landlord under the general court procedure available to all. The

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[4] *McGowan* v. *Maryland*, 366 U.S. 420 (1961).

[5] *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

tenant need only pay the rent which he is otherwise obligated to pay during the pendency of the court action so as not to be subject to eviction for failing to pay rent. Oregon's eviction procedure equally prohibits the landlord from raising any issues other than the issue of the right to possession of the property. The landlord may not join claims for unpaid rent, for damage to the property, for damages for wrongfully withholding the property, or for breach of any other provision of the agreement between them and avail himself of the eviction procedure of Or. Rev. Stat. §§ 105.105-.160.[6] The limitation of the eviction procedure to consideration of the issue of the right to possession and relevant defenses is therefore not so unreasonable as to violate the Equal Protection clause of the Fourteenth Amendment to the U. S. Constitution.

Oregon's eviction law does not create a procedural distinction based on wealth as appellants contend. With the exception of the requirement of the appeal bond, a tenant is not required to pay or provide security for any amount in excess of the rent which he obligated himself to pay when he rented the porperty from his landlord. Oregon's eviction procedure does not infringe upon a tenant's right to the sanctity of his home or any other fundamental right. The guarantee of such rights is predicated on the assumption that the tenant has the legal right to possess the residence in which he has established his home. Oregon's eviction law merely establishes a procedure whereby

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[6] See Or. Rev. Stat. §§ 16.220(1)(i), 105.105-.160.

his landlord can obtain a court determination as to whether the tenant has the legal right to the possession of the residence. If the tenant has the right to possession of the residence he will not be disturbed as a result of Oregon's eviction procedure. Therefore, the procedure clearly does not invade the sanctity of the tenant's home. The concept expressed in *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), and the other cases cited by appellants are not applicable here.

2. Oregon's eviction law does not violate the Due Process Clause of the Fourteenth Amendment to the U. S. Constitution by reason of the fact that a tenant cannot assert in an eviction action all of the claims he may have against his landlord.

Oregon's eviction law does not deny the tenant the opportunity to assert any defenses in an eviction action as appellants contend. The scope of the defenses which a tenant can assert are limited solely by the fact that the eviction action involves the consideration of only the issue of the right to possession of the property. The tenant can assert those defenses which are relevant to the issue of the right to possession of the property.

Generally in an eviction action, the landlord asserts the right to possession of the property by reason of a right granted by Or. Rev. Stat. §§ 91.070, 91.080, or 91.090.[7] The Oregon Supreme Court has held on a number of occasions that the tenant can assert defenses which are relevant to the questions raised by

[7] See Appendix "A."

the landlord's claim to the right of possession of the property under one of the above statutes.[8]

The appellants have set forth in their brief three defenses which they contend are relevant to the issue of the right to possession yet are not available defenses under Oregon's eviction proceedings. The first is that the lease is illegal and therefore unenforceable because conditions existing in the property violate the city housing codes. The second is that the landlord has breached his implied warranty that the property is habitable. The third is that the landlord is seeking to evict the tenant in retaliation for the tenant exercising his legal rights.

The agreement between a landlord and a tenant is not illegal because the residence rented contains conditions which violate the housing code of the City of Portland. The code makes it unlawful to use or occupy a residence only when the Bureau of Building Inspections has previously found conditions in the residence which violate the housing code, and has ordered the conditions repaired or the reisdence vacated.[9] The rule

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[8] See *Friedenthal* v. *Thompson*, 146 Or. 640, 31 P.2d 643 (1934) (reformation of written lease); *Share* v. *Williams*, 204 Or. 664, 277 P.2d 775, 285 P.2d 523 (1955) (defendants asserted rights under agreement cancelling contract of sale of property from plaintiff); *Leathers* v. *Peterson*, 195 Or. 62, 244 P.2d 619 (1952) (deed of property from defendant to plaintiff was intended as a mortgage and defendant was the owner of the property); *Priester* v. *Thrall*, 229 Or. 184, 349 P.2d 866, 365 P.2d 1050 (1961) (plaintiffs held legal title to real property as trustees for defendants who held an equitable interest in the property).

[9] See Appendix "B" to Motion of Appellee Normet to Dismiss or in the Alternative Affirm.

stated in *Uhlmann* v. *Kin Daw*[10] requires that the code either expressly state that agreements to rent residences containing code violations would violate the statute, or it must be clear that such was the legislative intent of the code. In none of the three eviction actions filed had the Bureau of Building Inspections found that the residence contained conditions which violated the housing codes and ordered the conditions repaired or the residence vacated.[11]

The City Council of the City of Portland on September 23, 1971, will consider a proposed ordinance prohibiting the renting of residences vacated by order of the Bureau of Building Inspections for failure to repair the code violations until the code violations have been repaired.

Even if the agreement between the landlord and the tenant were illegal and unenforceable, it is not relevant to the question of whether the landlord has the right to possession of his property. An action under Oregon's eviction law is not an action to enforce the agreement between the landlord and the tenant. It is an action brought to determine whether the landlord is entitled to possession of his property as granted under Or. Rev. Stat. §§ 91.070, 91.080, or 91.090. The fact that the agreement between the landlord and tenant may be illegal is not relevant to the question of whether the landlord is entitled to possession of the property under one of the above statutes. Generally, the judges of the District Court of the State of Ore-

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[10] 97 Or. 681, 193 Pac. 435 (1920).
[11] A. 45-49; Pl. Ex. 1, 2 and 47.

gon for the County of Multnomah, the trial court in the majority of the eviction actions, have held that the defense is not relevant, but the question has not been considered by the Oregon Supreme Court.

The fact that certain conditions on the rented property make the property uninhabitable is not relevant to the question of whether the landlord has the right to possession of his property. It is true that a few jurisdictions have imposed upon the landlord an implied warranty that rented property is habitable. The Oregon Supreme Court has not had the opportunity to consider this question, nor has the Oregon legislature imposed such a duty on the landlord in Oregon, or granted the tenant the right to withhold payment of rent to compel landlords to repair housing code violations existing in rented property. Clearly a state is not compelled by the Due Process clause of the Fourteenth Amendment to the U. S. Constitution to create such a warranty or such a right in the tenant either by legislative or judicial action. Since neither the warranty of habitability nor the right to withhold payment of rent to compel a landlord to repair housing code violations exists under Oregon law, the defense raised by the appellants in this case cannot be relevant to the issue presented in an eviction action.

The defense that the landlord seeks to evict the tenant in retaliation for the tenant asserting a legal right would appear to be a valid defense which a tenant could assert in an eviction action. There is no evidence in this case that a tenant has been deprived of

the opportunity to assert such defense in an eviction action or that the Oregon courts would refuse to allow such a defense had they the opportunity to consider it. The defense of retaliatory eviction was not raised before the trial courts in the eviction actions described in the statement of this case, nor has the Oregon Supreme Court considered the defense.[12] Nor does Or. Rev. Stat. §§ 105.105-.160 expressly prohibit this defense. Where possible it is this Court's duty to interpret Oregon's eviction law so as to render it constitutional if possible.[13]

In addition the question of the availability of the defense of retaliatory eviction was not presented to the U. S. District Court in the proceedings below in this case.[14] Appellants raise this question here for the first time. Added theories asserted for the first time on appeal to the United States Supreme Court are not regarded favorably, and are rejected except in cases of unusual importance, which is clearly not the case here.[15]

In no event would the defenses of illegality of the agreement between the landlord and the tenant and breach of the warranty of habitability be relevant where the eviction action is brought on the ground that the tenant's lease has expired, or the landlord has given the tenant notice to vacate the property as provided by statute. Appellants appear to concede this fact.[16]

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[12] See Pl. Exs. 1, 2 and 47.
[13] *Ullmann* v. *U. S.*, 350 U.S. 422 (1956).
[14] See transcript of proceedings June 18, 1970.
[15] *U. S.* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).
[16] See Appellants' Brief 31.

A tenant is not deprived of his right to assert those claims which are not relevant defenses in an eviction action. A tenant may assert all other claims which he may have against his landlord in an action against the landlord for breach of the lease, or as defenses in an action brought by the landlord to collect unpaid rent, utility bills or mechanics' liens against the property, damage to the leased property, or for breach of any other provision of the lease agreement between the landlord and tenant. Nor is an indigent tenant compelled by economics to forego asserting claims against his landlord by reason of Oregon's eviction procedure. The indigent tenant need only continue to pay the landlord the rent due him as it becomes due if he wishes to retain possession of the leased property and file an action against his landlord asserting such claims. The tenant need pay no more than that which he obligated himself to pay when he rented the property from his landlord.

This Court has held that a state can, consistent with the Due Process clause of the Fourteenth Amendment to the U. S. Constitution, provide a separate summary proceedings to determine just the right to possession of property and exclude therefrom other claims and defenses which the occupant may have against the owner of the property.[17]

A landlord can not be deprived of his right to evict a tenant on the pretense that it is necessary to assure compliance with the Code of the City of Portland, Ore-

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[17] *Bianchi* v. *Morales*, 262 U.S. 170 (1923).

gon. Section 29.28.010(a) of the Code of the City of Portland, Oregon, authorizes the Building Inspections Director to order the owner or occupant of a residence to correct substandard conditions existing in the residence within a specified period of time. If the substandard conditions are not corrected as directed, the Building Inspections Director is authorized to proceed with the enforcement of the penal provisions under the code, and proceed with the condemnation and demolition of the building.[18] There is no evidence in this case that the City of Portland has been derelict in its duty to enforce its housing code. The evidence is to the contrary. The Director of Building Inspections of the City of Portland ordered appellants and appellee to vacate the residence due to existing substandard conditions.[19] The Due Process clause of the Fourteenth Amendment to the U. S. Constitution does not compel all state statutes to aid enforcement of housing codes.

Under the Code of the City of Portland, Oregon, the landlord is given the right to elect whether to repair the substandard conditions existing in the residence, or allow the residence to be vacated, condemned and demolished. Often times the cost of repairing a residence to comply with the housing code would exceed the value of the residence after it is repaired. Also, the landlord may desire to use the property for

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[18] See Code of the City of Portland, Oregon, Sections 14.08.010 and 29.28.010 (b) and (c), Appendix "B" to Motion of Appellee Normet to Dismiss or in the Alternative Affirm.

[19] See A. 43.

other than residential purposes. If the tenant can defeat an eviction action by showing that housing code violations exist in the residence, the landlord would be deprived of this right to determine the use of his property.

3. The minimum allegations required in an eviction complaint by Or. Rev. Stat. § 105.125(3) give a tenant sufficient notice of the alleged grounds for eviction that the statute does not violate the Due Process clause of the Fourteenth Amendment to the U. S. Constitution.

Or. Rev. Stat. § 105.125(3) requires as the minimum allegations necessary to state a cause of action for eviction, a description of the premises, and allegations that the tenant is in possession of the premises, that the tenant unlawfully holds the premises with force, and that the landlord is entitled to possession. The complaint must also contain a prayer for the relief requested.[20]

The term "unlawful holding by force" is specifically defined in Or. Rev. Stat. § 105.115 as failing to pay rent within 10 days after the date due, or remaining in possession of the property after expiration of a lease or after receipt of notice to vacate. These grounds for eviction are common knowledge among tenants as well as landlords. The tenant in every conceivable instance has knowledge equal to that of the landlord of the facts constituting the ground for eviction. The tenant knows whether he has paid his rent, whether his lease has expired, or whether he has received notice to vacate the property.

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[20] Or. Rev. Stat. § 16.210(2).

The minimum allegations required by Or. Rev. Stat. § 105.125 adequately advise the tenant that his landlord is seeking to recover possession of property which the tenant possesses, and that his landlord bases his right to possession of the property on the tenant's failure to pay rent within 10 days after it was due, the expiration of his lease, or the receipt by the tenant of the statutory notice to vacate. Which of the alternative grounds the landlord is asserting is within the knowledge of the tenant in every conceivable case.

The U. S. District Court for the District of Oregon in the proceeding below found: "The pleadings required by the challenged statute [Or. Rev. Stat. § 105.125(3)] are at least as informative as those required by the Federal Rules of Civil Procedure."[21] The court held that the notice required by Or. Rev. Stat. § 105.125(3) was not unreasonably vague in view of the nature of the typical eviction case. The court noted that to require additional allegations in an eviction complaint would tend to elevate form over substance.[22]

4. The period of time between the service of summons and the trial of an eviction action as prescribed by Or. Rev. Stat. §§ 105.135 and 105.140 provide a tenant sufficient time within which to prepare his defense, and do not violate the Due Process clause of the Fourteenth Amendment to the U. S. Constitution.

Or. Rev. Stat. § 105.135 provides for a two to

[21] A. 75.
[22] A. 75.

four day period between the service of summons and the trial of the eviction action. Or. Rev. Stat. § 105.140 provides for a continuance of the two to four day period for an additional two days without the posting of security, and for an unlimited continuance upon the condition that the tenant file an undertaking with such security as the court may approve to the effect that the tenant will pay the landlord the rent accruing during the period of the requested continuance if judgment is ultimately rendered against the tenant. The statutes expressly allow a continuance where an undertaking is provided, and do not limit to six days the period within which a tenant has to prepare his defense as appellants contend.

The appellants' statement that in the usual case the tenant is served on Friday and trial is on Monday afternoon is untrue and not supported by any evidence. None of the three cases filed against plaintiffs in this case was served on Friday. Colton was served on a Monday; trial was set for the following Friday. Oetting was served on a Wednesday; trial was set on the following Monday. Lowe was served on a Tuesday; trial was set on the following Friday. In each case the trial was continued.[23] Neither is appellants' statement that a tenant has difficulty in finding a lawyer to appear in court and request a continuance on two or four days' notice true nor supported by any evidence.

Since a tenant can file a personal undertaking,

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[23] Supra, Note 11.

and deliver to the court as security the rent which would accrue during the period of the continuance requested, a tenant must pay or provide security for no more than he would have had to pay the landlord as rent had the eviction action not been filed.

The Due Process clause of the Fourteenth Amendment requires only that a party be given reasonable notice of the action filed against him and reasonable opportunity to appear and assert his defenses.[24] In determining whether notice and the opportunity to defend are reasonable, the court must consider the nature of the proceedings.[25]

In an eviction action the only questions presented are whether the landlord or the tenant has the legal right to possession of the property, and defenses which are relevant to the question of who has the legal right to possession of the property. The only grounds which a landlord can assert are that the tenant failed to pay the rent within 10 days after it was due, or that the tenant failed to vacate the property after termination of his lease or notice to vacate. The limited issues presented in the usual eviction case require as proof evidence which is not difficult or complex and which is equally available to the landlord and tenant. In addition the tenant is not required to file a written answer.

In an eviction action, prior to receipt of summons the tenant has at least an additional 10 days' notice of eviction in the case of eviction for nonpayment of

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[24] *Dohany* v. *Rogers*, 281 U.S. 362 (1930).
[25] Id. at 369.

rent, and at least an additional 30 or more days' notice in the case of eviction because of termination of lease or notice to vacate. These periods are available for the tenant to prepare his defense for it is inevitable that a landlord will file an action to evict a tenant who has failed to pay rent or who has failed to vacate the premises upon termination of his lease or after receipt of notice to vacate. Therefore, in considering the usual case brought under Oregon's eviction law, the tenant is not deprived of sufficient time within which to adequately prepare his defense, and the statutes do not violate the Due Process clause of the Fourteenth Amendment to the U. S. Constitution.[26]

5. The appeal bond required by Or. Rev. Stat. § 105.160 is not so unreasonable as to violate the Due Process clause of the Fourteenth Amendment to the U. S. Constitution.

Or. Rev. Stat. § 105.160 requires as a condition for an appeal by a tenant from a judgment in favor of the landlord that he file an undertaking to pay twice the rental value of the property from the commencement of the case to the final judgment should the landlord prevail in the appeal.[27] The statute does not require a corporate surety bond, a personal undertaking is sufficient. Since the final judgment in an action brought under Oregon's eviction law cannot include a judgment for rent, for damage to the property, or for damages for wrongful holding over, the

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[26] *Dohany* v. *Rogers*, Supra, Note 24.
[27] Or. Rev. Stat. § 105.160.

requirement of such an undertaking is not so unreasonable as to violate the Due Process clause of the Fourteenth Amendment of the U. S. Constitution.[28]

The Oregon Supreme Court in the *Scales* case noted that the bond for double the rental value of the property was reasonable as liquidated damages for rent, waste, and wrongful holding over, and to prevent frivolous appeals by a tenant who would otherwise have nothing to lose by appealing an eviction judgment against him. If the tenant was only required to post security for the payment of rent during the period of the case, the tenant could defeat the effect of the eviction judgment for a year or more by merely appealing the case to the Oregon Supreme Court. Security requirements have been upheld by this Court as not in violation of the Due Process or Equal Protection clauses of the U. S. Constitution where they are reasonable.[29]

The fact that Or. Rev. Stat. § 19.040(1)(b) requires an undertaking on appeal in cases involving the possession of real property does not adequately protect the landlord as it applies only in appeals from the circuit courts to the Court of Appeals or Supreme Court of the State of Oregon. Or. Rev. Stat. §§ 46.250 and 53.040 apply with regard to appeals from the district court to the circuit court. Or. Rev. Stat. § 53.040 requires only that the appellant provide an undertaking to the effect that appellant will satisfy

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[28] *Scales* v. *Spencer*, 246 Or. 111, 424 P.2d 242 (1967).

[29] *Cohen* v. *Beneficial Industrial Loan Corp.*, Supra, Note 5.

any judgment that may be given against him in the appellate court on the appeal. This is not satisfactory, as the landlord in an action brought under Oregon's eviction law is not permited a judgment for the rent accruing during the period of the pendency of the case nor a judgment for damages for waste or wrongfully withholding the premises from him.

Appellants' contention that the trial before the District Court of the State of Oregon is rendered an unconstitutional trial merely because the court is not a court of record and the appellant has the right to appeal to the Circuit Court of the State of Oregon and obtain a trial de novo has been rendered moot by the enactment of Sections 4 and 7, Chapter 623, Oregon Laws 1971. Section 4 provides that a District Court of the State of Oregon is a court of record. Section 7 provides that the appeal to Circuit Court of the State of Oregon is heard on that record and is reviewed only as to questions of law appearing upon the record.[30]

CONCLUSION

The Court should affirm the U. S. District Court's judgment dismissing this case on the grounds that Oregon's eviction law, Or. Rev. Stat. §§ 105.105-.160, does not violate the Equal Protection or Due Process clauses of the Fourteenth Amendment to the U. S. Constitution.

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[30] See Appendix "B."

The characteristics which are unique to the landlord-tenant relationship and the statutory prohibition against forcibly taking possession of real property are sufficient justification for the State of Oregon to establish an added procedure for obtaining a court determination as to who has the legal right to possession of real property without the delays of the ordinary litigation process. The limiting of the eviction action to the consideration of only the right to possession and relevant defenses and the limiting of the time available without providing security are reasonably necessary to accomplish the objective of the eviction law. Oregon's eviction law does not therefore violate the Equal Protection clause.

Oregon's eviction law allows the tenant to assert in an eviction action all defenses which are relevant to the issue of who has the legal right to possession of the property. The law does not procedurally nor practically prohibit a tenant from asserting all other claims or defenses which he may have against his landlord in a separate action against him. The notice required by the Oregon eviction law, the hearing, and time provided to prepare for the hearing are reasonable in light of the limited issues considered, the availability of the proof and the facts of the usual case. The Oregon eviction law does not thereby deprive the tenant of the Due Process of law guaranteed by the U. S. Constitution.

The appeal bond required by Or. Rev. Stat. § 105.160 is not so unreasonable that it deprives a tenant of the Due Process of law guaranteed by the

U. S. Constitution. The landlord cannot avail himself of the eviction procedure and join a claim for rent, damage to the rented property, or damages for wrongfully withholding the property. Therefore, it is reasonable to provide the landlord with security for double the rental value of the property during the appeal as liquidated damages for these potential claims.

Respectfully submitted,

THEODORE B. JENSEN
DONALD J. DEFRANCQ
DAVIS, JENSEN, DEFRANCQ & HOLMES
623 S. W. Oak Street
Portland, Oregon 97205
Counsel for Appellee
Dorothea M. Normet

APPENDIX "A"

Or. Rev. Stat. § 91.070. Tenancy from month to month. One who holds the lands or tenements of another, under the demise of the other, and no certain time has been mentioned, but a monthly rental has been reserved, is considered a tenant from month to month. Except as otherwise provided by statute or agreement, such tenancy may only be terminated by either the landlord or tenant giving the other, at any time during the tenancy, not less than 30 days' notice in writing prior to the date designated in the notice for the termination of the tenancy. The tenancy shall terminate on the date designated and without regard to the expiration of the period for which, by the terms of the tenancy and holding, rents are to be paid.

Or. Rev. Stat. § 91.080. Termination when expiration of tenancy fixed by terms of lease. A tenant entering into the possession of real estate may, by the terms of his lease, fix the date of expiration of his tenancy, and when so fixed, no notice is required to render the holding of the tenant wrongful and by force after the expiration of his term as fixed by his lease.

Or. Rev. Stat. § 91.090. Termination of tenancy by failure to pay rent; reinstatement. The failure of a tenant to pay the rent reserved by the terms of his lease for the period of 10 days, unless a different period is stipulated in the lease, after it becomes due and payable, operates to terminate his tenancy. No

notice to quit or pay the rent is required to render the holding of such tenant thereafter wrongful; however, if the landlord, after such default in payment of rent, accepts payment thereof, the lease is reinstated for the full period fixed by its terms, subject to termination by subsequent defaults in payment of rent.

APPENDIX "B"

CHAPTER 623, OREGON LAWS 1971, AN ACT Relating to the administration of justice, including but not limited to district courts; creating new provisions; amending ORS 46.060, 46.070,

* * *

SECTION 4. (1) A district court is a court of record whose judgments and decrees have the same force and effect and may be pleaded in the same manner as judgments and decrees of a circuit court.

(2) ORS 18.310 to 18.370 and 18.400 to 18.430 apply to judgments and decrees of a district court.

* * *

SECTION 7. (1) Within 30 days after filing notice of the appeal, the appellant shall cause a record of the case to be filed with the clerk of of the circuit court. The record shall include a copy of all the material entries in the docket of the district court relating to the cause and the appeal, and all the original papers relating to the cause and the appeal and filed with the district court. The record may include such report, transcript prepared by an individual reporter

or transcript electronically reported, or statement of the proceedings in the district court as authorized by and prepared pursuant to law and to rules made by the district court, which rules shall be substantially uniform throughout the state and approved by the Supreme Court.

(2) If the record of the case is not filed within the time provided, the circuit court, within the time provided for that filing, may by order extend the time for the filing upon such terms as the circuit court considers just.

(3) The circuit court by rule shall establish procedure for the filing of written briefs and the presentation of oral argument on such case.

(4) The appeal shall be heard and determined by the circuit court on that record. Upon an appeal from a judgment, the judgment shall be reviewed only as to questions of law appearing upon the record, and shall be reversed or modified only for errors substantially affecting the rights of the appellant. Upon an appeal from a decree, the suit shall be tried anew upon the record.